Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-902

HIRSCH FRIEDMAN,

Petitioner,

vs.

MARY ELLEN HARBOLD,

Respondent.

WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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IN THE

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OCTOBER TERM, 1979

NO. _____

HIRSCH FRIEDMAN,

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vs.

MARY ELLEN HARBOLD,

Respondent.

WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on May 29, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 150 Ga. App. 482.

JURISDICTION

The judgment of the Georgia Court of Appeals (Appendix A, infra, page A. 1) was entered on May 29, 1979. A timely Petition for Rehearing was denied on June 28, 1979 (Appendix B, infra, page A. 5). The judgment of the

Supreme Court of Georgia denying Petitioner's Application For A Writ Of Certiorari (Appendix C, infra, page A. 6), was entered on September 4, 1979. The transcript of the contempt hearing is attached hereto (Appendix D, infra, page A. 6). The jurisdiction of this court is invoked under 28 United States Code Section 1257(3).

QUESTIONS PRESENTED

An individual subject to a non-summary hearing on a contempt charge has the right to have the hearing before a Judge other than the one issuing the citation. The trial court's failure to afford Petitioner a neutral forum denied him his right to due process of the law as guaranteed by the 14th Amendment of the United States Constitution and Section 2-101 of the Georgia Code. Further, the Petitioner should never have been treated any differently because he was an attorney since at the time of the alleged contemptuous conduct, he was merely a defendant/witness, and while he may have retained his role as an officer of the court, he was not acting as such in an "official transaction" so as to fall within the purview of the contempt statute. Georgia Code Section 24-105. This disparate treatment constituted a violation of Petitioner's right to equal protection of the laws under the guarantees of the United States Constitution's 14th Amendment and Section 2-203 of the Georgia Code. Further, the Petitioner's constitutional guarantees of freedom of speech and expression were violated when he was cited for contempt emanating from an isolated statement made during the course of an otherwise orderly trial. Finally, the trial court violated Petitioner's rights to due process of the law by failing to place its findings in writing so the appellate courts would have an adequate standard of review

under Georgia Code Section 81A-152. Consequently, the questions presented herein are:

1.

Has the Petitioner been denied due process of the law under the Fourteenth Amendment to the United States Constitution and Section 2-101 of the Georgia Code, as a result of his non-summary contempt hearing being heard before the same Judge issuing the citation?

2.

Has the Petitioner been denied equal protection of the laws under the Fourteenth Amendment of the United States Constitution and Section 2-203 of the Georgia Code when he was held to a higher standard of culpability than any other witness under the same or similar circumstances?

3.

Has the Petitioner been denied his Constitutional guarantees of free speech and expression under the First Amendment to the United States Constitution and Georgia Code Section 2-104, when he was punished for an isolated statement made during the course of an otherwise orderly trial and where it was shown that his in-court statement was largely the result of an ongoing illness compounded by Respondent's harrassment and where this conduct posed no clear and present danger to the orderly administration of justice?

4.

Has the Petitioner been denied due process of the law guaranteed by both the Federal and State Constitutions, when the trial court failed to specifically find facts and

conclude issues of law so as to make the judgment so vague and ambiguous as to be void.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved herein are the pertinent portions of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution and the guarantees of free speech and expression guaranteed under the First Amendment to said Constitution, as well as the corresponding sections of the Georgia State Constitution as expressed in Sections 2-101, 2-104, 2-203 of the Georgia Code, respectively. Other statutory provisions involved herein are Georgia Code Sections 24-105 and 81A-152. These provisions are printed in Appendix F, attached hereto.

STATEMENT OF THE CASE

The decision and judgment of the Georgia Court of Appeals herein complained of, arises out of the following factual situation:

The original lawsuit was one for damages allegedly caused by a dog bite sustained by Respondent on the 15th day of November, 1976. Defendant DEBORAH L. BLACKMAN owned the dog, filed no defense to the case and was unrepresented by counsel; but appeared upon being subpoenaed as a witness for Respondent. Said Defendant cared for the home and children of Petitioner HIRSCH FRIEDMAN, and lived in the premises owned by Petitioner.

Petitioner was represented by counsel provided by State Farm Insurance Company in behalf of a home-

owner's policy issued to him. Defendant DEBORAH L. BLACKMAN without counsel admitted to the jury her liability, but stated she did not have the money to pay for any damages. Petitioner alleged that he had directed Defendant DEBORAH L. BLACKMAN to remove her dog from the premises prior to the alleged incident.

Petitioner by profession is a practicing attorney and a member in good standing of the State Bar of Georgia. Although same has no bearing upon the main action, same does have relevance to the instant Petition for the holding of said Petitioner in contempt of court.

During the trial as to the issue of whether or not Petitioner would be liable because the dog was present on the premises owned by him, Respondent, MARY ELLEN HARBOLD during the questioning of Petitioner ". . . was making faces . . ." at Petitioner while he was on the witness stand (T-4). Additionally, Petitioner stated during the hearing on the contempt charge that he was diagnosed as suffering from an illness called hypoglycema (T-5), and a thyroid dysfunction (T-5), and that these illnesses affected him emotionally as a result of his being placed on a special diet (T-5). Nothing to the contrary was stated to the court, and the trial judge accepted same, stating that he gave consideration to Petitioner's statement and was sympathetic to the situation, and notwithstanding same found Petitioner guilty of contempt of court (T-8) based upon the fact that during the time Petitioner was being questioned and during the same time that Respondent was making faces at Petitioner the following colloquy between Respondent's counsel and Petitioner occurred:

> "MR. BURNETT: Okay. And, it's still your testimony that you are the only person here today that

has spoken the complete truth, that you have heard?

MR. FRIEDMAN: Sir, every one of your witnesses have lied through their teeth.

MR. BURNETT: That includes Mrs. Webb?

MR. FRIEDMAN: That includes you, sir."

(T-2, 3) The trial court stated in its opinion that this response by Petitioner was contemptuous, and at the end of the trial on the 8th day of June, 1978, instructed Petitioner to come before the court on the 16th day of June, 1978 ". . . to consider a Contempt Action against . . ." Petitioner for said response. Petitioner at said hearing on the 16th day of June, 1978 advised the court that immediately upon responding to the Respondent's attorney's question, he apologized (T-3), and that he never intended to be disrespectful to the court or Respondent's attorney (T-4), and that if said statement was found to be contemptuous not only was it not intended to be such, but that as a defense Petitioner showed the court that during said questioning Respondent was making faces at Petitioner, that such dog bite cases were ". . . pent up with emotion in the first place." (T-4) and that Petitioner was presently affected by illnesses diagnosed as hypoglycemia and thyroid dysfunction.

Finding that the Petitioner was guilty of contempt and immediately subsequent to the sentence of the court, a timely appeal was filed.

REASONS FOR GRANTING THE WRIT

I.

THE FAILURE TO AFFORD PETITIONER A NON-SUMMARY HEARING BEFORE A JUDGE OTHER THAN THE JUDGE ISSUING THE CONTEMPT CITATION DENIED PETITIONER DUE PROCESS OF THE LAW

The decision of the Georgia Court of Appeals should be reviewed by this Honorable Court because it fails to properly address the significant issue of whether Petitioner's constitutional right to due process of the law was violated when the trial judge served as both accuser and trier of fact at the non-summary contempt hearing.

The Court of Appeals recognized that the Federal Courts take a contrary view to its decision, but because they could not find a Georgia case in point, they were bound to follow the dictates of *Cabot v. Yarbourough*, 27 Ga. 476, a case decided in the infancy of American jurisprudence.

The decision of the Court of Appeals was without question erroneous in its interpretation of the rule of law laid down in *Offutt v. United States*, 348 U.S. 11; *In Re: Murchison*, 349 U.S. 133 and *Mayberry v. Pennsylvania*, 400 U.S. 455.

This Court has definitively ruled that the due process clause of the 14th Amendment entitles one charged with contempt to have the merits of the contempt trial heard before a different judge than the one issuing the citation. In *Mayberry v. Pennsylvania, supra*, this Court specifically noted that the *state courts* are to be governed by the notion of due process and when a non-summary hearing is scheduled, a different judge is required:

"Whether the trial be federal or state, the concern of due

process is with the fair administration of justice. At times a judge has not been the image of "the impersonal authority of law" (Offutt v. United States, 348 US 11, 17, 99 L Ed 11, 17, 75 S Ct 11) but has become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.

> "The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give bent to personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice." Id., at 14, 99 L ed at 16. (Emphasis supplied)

The Court of Appeals' statement that no Georgia authority exists was likewise in error. Indeed, the *Mayberry* rationale was explored and adopted by inference in *Farmer v. Holton*, 146 Ga. App. 102, 245 SE2d 457.

In *Farmer*, the rule stated was that a court of record held the inherent power to summarily punish alleged contumacious conduct and that if summary punishment were chosen, due process considerations expressed in *Mayberry* need not be followed, ostensibly due to the need to react quickly and decisively. Conversely then, if the trial court opted to wait (as did the court in the case sub judice) then the proper procedure would be to allow another judge to hear the merits. See: *Farmer v. Holton*, 146 Ga. App. at 103, 4 (note 2). No other procedure would comport with due process requirements under both Federal and Georgia law.

II.

THE TRIAL COURT'S ATTEMPT TO HOLD PETITIONER TO A HIGHER STANDARD OF CULPABILITY THAN ANY OTHER WITNESS

DENIED HIM EQUAL PROTECTION OF THE LAWS

The decision by the Georgia Court of Appeals also denied Petitioner equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution and Georgia Code Section 2-203.

The gravamen of Petitioner's complaint on the above concerns the court's obvious feeling that as an attorney, MR. FRIEDMAN never shed his duties as an officer of the court. Petitioner asserts this view is only correct insofar as the first prong of the two prong test of Georgia Code Section 24-105 is concerned. That is, not only must it be shown that Petitioner was an officer of the court, but the conduct complained of in such a status must have transpired as he was carrying out an "official transaction". Simply put, there must be a joining of both status and conduct.

The instant case only shows the former and a contempt citation was in error in absence of the latter. Petitioner, although an attorney and officer of the court, was not before the court pursuant to an "official transaction". Petitioner was merely a defendant/witness in a dog bite case.

> "While attorneys as officers of the court are under a duty to maintain the integrity and dignity of the Court and respect for its authority for acts committed . . . as an officer of the Court in an official transaction . . . , attorneys are no more amenable to attachment and summary punishment for contempt of Court than are other persons." *Townsend vs. U.S.*, 54 Ga. App. 627, 188 S.E. 560.

In the instant matter, the court below stated "I consider the matter *much more grave* due to the fact that you

are a practicing attorney . . . ." The words of the Georgia Code as to the powers of the court to punish for contempt, Title 24, Sec. 105, provides as to attorneys (being officers of the court) that the misbehavior must be as officers of the court in their official transactions. To allow a layman not to be held in contempt in a case where the statutory prerequisites are met, and on the other hand and on the same grounds, to hold an attorney guilty of contempt for acts not constituting a function within his capacity as an officer of court, is to deny attorneys equal protection of the law, and to single out attorneys as a separate class of persons to be prosecuted for contempt for the same conduct that a layman would not be prosecuted for. Accordingly, unless it be shown that the conduct complained of was such that a layman under the same circumstances would have been held in contempt of court, the judgment finding Petitioner guilty of contempt must be reversed.

III.

THE CONTEMPT CONVICTION, PREDICATED UPON AN ISOLATED STATEMENT NOT POSING A CLEAR AND PRESENT DANGER OF INTERFERING WITH THE ORDERLY ADMINISTRATION OF JUSTICE DENIED PETITIONER HIS RIGHTS TO FREEDOM OF SPEECH AND EXPRESSION

The decision by the Georgia Court of Appeals further denied Petitioner of his rights to freedom of speech and expression as guaranteed fundamental rights by both the United States and Georgia Constitutions (First Amendment, United States Constitution; Georgia Code Section 2-104).

No one disputes the fact that the trial was an orderly one and that Petitioner was charged with contempt for

an isolated statement which he believes was not disruptive when viewed under the totality of the circumstances and which was clearly an abuse of discretion on the part of the trial court. The entire episode was compounded by Petitioner's ongoing illness and that Respondent was harrassing Petitioner. The culmination of all these competing forces produced the following colloquy between Respondent's counsel and Petitioner:

> "MR. BURNETT: Okay. And, it's still your testimony that you are the only person here today that has spoken the complete truth, that you have heard?
> MR. FRIEDMAN: Sir, every one of your witnesses have lied through their teeth.
> MR. BURNETT: That includes Mrs. Webb?
> MR. FRIEDMAN: That includes you, sir."

(T-2, 3) The trial court stated in its opinion that the above response by Petitioner was contemptuous, and at the end of the trial on the 8th day of June, 1978, instructed Petitioner to come before the court on the 16th day of June, 1978 ". . . to consider a Contempt Action against . . . " Petitioner for said response. Petitioner at said hearing on the 16th day of June, 1978 advised the court that immediately upon responding to Respondent's attorney's question, he apologized (T-3), and that he never intended to be disrespectful to the court or Respondent's attorney (T-4), and that if said statement was found to be contemptuous not only was it not intended to be such, but that as a defense Petitioner showed the court that during said questioning Respondent was making faces at Petitioner and that same was compounded by a physical illness diagnosed as hypoglycemia (T-5).

Petitioner urges this court to recognize that a serious question is raised by the trial court's invasion of his constitutionally protected right of free speech and expression.

The developing case authority in this area demonstrates a delicate balance is struck when First Amendment guarantees compete against the contempt powers of the state courts. Such was the case in *Wood v. Georgia*, 370 U.S. 375, where it was held that out-of-court utterances must pose an imminent, and not merely a like or probable, threat to the orderly administration of justice. Since the prerequisites of the "clear and present danger" rule were held not to have been shown, the *Wood* conviction was reversed.

The paramount issue thus becomes whether Petitioner's in-court utterances should be judged by the same standards applied by this court to the out-of-court utterances presented in *Wood v. Georgia, supra.* It is thus whether the "clear and present danger" formula is applicable to both situations; a notion which Petitioner suggests is indeed the proper view.

To determine whether the "clear and present danger" rule is applicable, it is important to understand the Georgia Code Sections relevant to the contempt powers of the state courts of Georgia. As was explained in *Harrell, et al. v. Word, et al.*, 54 Ga. 650, the extent of the court to punish for contempt and its limitations are defined:

> ". . . The power of the courts to punish for contempt in Georgia, is limited. The constitution declares that it shall be limited, and requires legislation to prescribe the limits: Code, section 5009. The legislature of the state has prescribed those limits: Code, section 4711. That section confines the power to cases in the presence of the courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the *disobedience or resistance* by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of said courts . . ." 54 Ga. at 652. (Emphasis supplied)

The Georgia Code Section as it existed in 1875 when *Harrell, supra,* was decided is for the most part the same as it exists today in Title 24, Section 105 of the Georgia Code:

> "24-105. (4643) Powers of the courts to punish for contempt.—The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree or command of the said courts:"

Petitioner was an officer of the court, but as a defendant, he was not an officer of the court involved in an official transaction, a concept more fully explored in Part II of this Petition. Further, there is absolutely no proof that Petitioner disobeyed or resisted any court officer, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the court. Interestingly enough, the above Code Section could arguably apply only to summary proceedings; and where, as here, Petitioner was subject to a non-summary proceeding, the court would seemingly have no authority to hold him in contempt in the first instance under *Harrell, supra.*

Thus, to be lawfully found in contempt of court, Petitioner must have misbehaved so as to have affected the

administration of justice by presenting a clear and present danger to that effect. Such was the rule of law forwarded in *Wood vs. Georgia, supra,* and should be applied to Petitioner's case.

In the instant matter, however, the record does not show anything that would permit any such imminent or clear and present danger of obstructing the administration of justice. "The danger must not be remote or even probable; it must immediately peril." *Wood, supra,* 370 U.S. at 385. In accord: *Bridges vs. California,* 314 U.S. 252; *Pennekamp vs. Florida,* 328 U.S. 331, *Craig vs. Harney,* 331 U.S. 367.

An application of the *Wood, supra,* rationale is compelled by the instant factual setting to require that a clear and present danger be demonstrated to legitimize an allegedly contemptuous in-court statement ruled upon at a non-summary hearing. Such is the Federal view and by implication, the law in Georgia, when First Amendment freedoms are brought into conflict with the contempt powers of the state courts.

IV.

THE TRIAL COURT'S FAILURE TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF THE LAW

Petitioner's final attack on the opinion by the Georgia Court of Appeals concerns due process violations with respect to the trial court's failure to abide by the Georgia Code by neglecting to document its findings of fact and conclusions of law. See: Georgia Code Section 81A-152 reproduced in Appendix E, in fra, page A. 13.

In *Brown vs. Hames,* 131 Ga. App. 148, 205 S.E.2d 716 (1974), the Court of Appeals reversed a contempt conviction where the trial court failed to specially find facts and conclusions of law upon and in support of the conviction. See also: *Carson vs. Georgia,* 146 Ga. 726(6); *Carter vs. State,* 129 Ga. App. 536, 537, 199 S.E.2d 925; *Garland vs. State,* 99 Ga. App. 826, 110 S.E.2d 143.

Accordingly, the judgment of the trial court was so vague and indefinite so as to be void and must therefore be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

HIRSCH FRIEDMAN, P.C.
Attorneys for Petitioner

By: /s/ SPENCER J. KRUPP

SPENCER J. KRUPP

3179 Maple Drive, N.E.
Atlanta, Georgia 30305
Phone: (404) 231-2025

CERTIFICATE OF SERVICE

I, Spencer J. Krupp, hereby certify that I have served a copy of the foregoing Petition on LAWRENCE S. BURNAT, at 127 Peachtree Street, N.E., Atlanta, GA 30303.

This 30th day of November, 1979

/s/ SPENCER J. KRUPP

SPENCER J. KRUPP
Attorney for Petitioner

APPENDIX A

Jan. Call
MAY 29 1979

57048. FRIEDMAN v. HARBOLD McM-11

McMURRAY, Presiding Judge.

Defendant Friedman, an attorney and witness in his own behalf as a party defendant in a dog bite case, was adjudged in contempt for disrespectful, rude and insulting behavior in the trial after he was given a hearing at the conclusion of the dig bite case. The contumacious conduct found by the trial court arose out of a portion of the trial proceeding in which defendant Friedman was being cross-examined as follows: "Q. Okay. And, it's still your testimony that you are the only person here today that has spoken the complete truth, that you have heard? A. Sir, everyone of your witnesses have lied through their teeth. Q. That includes Mrs. Webb? A. That includes you, sir." Defendant appeals, traversing the findings of fact. *Held:*

1. While our federal judiciary does not approve of the trial judge in the court in which the offense allegedly occurred serving as the accuser as well as the trial judge, hearing the charges preferred by him; nevertheless, we know of no decision preventing same in this state or a decision holding such a hearing in state courts to be violative of the due process clause of the 14th Amendment. See *Cabot v. Yarborough*, 27 Ga. 476. There is no merit in the complaint that such trial violates the due process clause of the 14th Amendment.

Further, this question was raised for the first time on appeal and was not raised in the trial court. See *Cowart v.*

Georgia Hospital Service Association, Inc., 135 Ga. App. 45 (1, 2, 3) (217 SE2d 379); *Garland v. State of Georgia*, 101 Ga. App. 395, 396 (2), 400 (114 SE2d 176).

2. Defendant admits that he, as a witness in the trial court, in the heat of battle, lost his head and in answering a question as to whether he thought another witness had not spoken the truth, he replied to counsel "[t]hat includes you, sir." While there have been many cases in which many instances of more flagrant contumacious remarks were made, nevertheless, the trial court did not err in holding it was contumacious in considering the facts and particularly so since the defendant was an officer of the court. See *In re Fite*, 11 Ga. App. 665 (2) (76 SE 397) *Garland v. State of Georgia*, 101 Ga. App. 395, supra; *Cochran v. Sosebee*, 120 Ga. App. 115 (169 SE2d 624).

3. In consideration of all the evidence the trail court did consider the evidence as to the defendant's illness, as well as other facts presented in mitigation, but, while sympathetic to the situation, the trial court refused to excuse or overlook the contumacious conduct. This case differs on its facts from *White v. State of Georgia*, 218 Ga. 290 (127 SE2d 668), which reversed *White v. State of Georgia*, 105 Ga. App. 616 (125 SE 239), affirming a judgment of contempt of the trial court. In the case sub judice the evidence supported the finding of contempt notwithstanding the claims of illness and loss of temper, as an excuse for the defendant's conduct.

4. The case of *Townsend v. State of Georgia*, 54 Ga. App. 627 (188 SE2d 560), involves conduct outside of a court and is not controlling here. Here, as an attorney and officer of the court, defendant did not shed these duties when he became a witness in his own behalf. As such he was charged with knowledge other witnesses did not neces-

sarily have in a court of law. See *Cohran v. Sosebee*, 120 Ga. App. 115, supra.

5. The findings of fact and conclusions of law conform to the requirements of Code Ann. § 81A-152 (CPA § 52; Ga.L. 1969, pp. 645, 646; 1970, pp. 170, 171). There is no merit in this complaint.

Judgment affirmed. Deen, C.J., and Birdsong, J., concur. Shulman, J., not participating.

APPENDIX B

Court of Appeals of the State of Georgia
ATLANTA, June 28, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

57048. Hirsch Friedman v. Mary E. Harbold

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, June 28, 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk

APPENDIX C

35404

SUPREME COURT OF GEORGIA
Atlanta, September 4, 1979

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

HIRSCH FRIEDMAN V. MARY E. HARBOLD

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta, September 20, 1979

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS, Clerk.

Case No. 57048

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

Clerk Court of Appeals of Georgia.

APPENDIX D

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

MARY ELLEN HARBOLD,
Plaintiff,

vs.

HIRSCH FRIEDMAN and
DEBORAH L. BLACKMAN,
Defendants.

NON-JURY HEARING

NO. 77-716

Transcript of proceedings before THE HONORABLE WM. T. DEAN on June 16, 1978 at Decatur, Georgia.

APPEARANCES OF COUNSEL:

For the Plaintiff: LAWRENCE S. BURNAT
Attorney at law

For the Defendant
HIRSCH FRIEDMAN: PRO SE

PATSY ILLICK
Official Certified Court Reporter
306 DeKalb County Courthouse
Decatur, Georgia 30030

THE COURT: Come around to the front, if you will, Mr. Friedman. Have a seat there, Mr. Friedman. Come up here, Mr. Burnat.

Mr. Friedman, you were notified to be here before this Court this morning to consider a Contempt Action against you for your conduct during the trial of the case of Harbold versus Friedman, et al. Do you have counsel, sir?

MR. FRIEDMAN: No, sir.

THE COURT: Do you desire to represent yourself?

MR. FRIEDMAN: With all due respect, yes, sir.

THE COURT: All right, sir. The Court has indicated to you the Court's feeling about the matter and that the Court is of the opinion that there was a contempt committed in the presence of this Court due to your conduct in making answers to certain questions asked by Mr. Burnat, attorney for the plaintiff, and I want the record at this time to show that the questions propounded you by counsel for the plaintiff, near the conclusion of trial, were as follows:

"MR. BURNAT: Okay. And, it's still your testimony that you are the only person here today that has spoken the complete truth, that you have heard?

MR. FRIEDMAN: Sir, everyone of your witnesses have lied through their teeth.

MR. BURNAT: That includes Mrs. Webb?

MR. FRIEDMAN: That includes you, sir."

Now this Court is of the opinion that the action on your part is subject to action by the Court, and on the basis of this citation of a contempt, have you any defense or witnesses or statements you wish to make for the record?

MR. FRIEDMAN: Yes, Your Honor, I would.

Your Honor, prior to giving a legal argument on the matter, and as the Court recalls, as Mr. Burnat recalls, I immediately apologized to the Court and to Mr. Burnat. I have been practicing in Atlanta now, this is my third year, just had my second anniversary. Never in those two years, Your Honor, those which I have previously experienced with the courts as a police officer; my experience as a businessman with the courts, have I ever allowed myself under any circumstances to get so personally involved as to lose my temper or to say something improper. And I will state to the Court most wholeheartedly, as I attempted to state at the last date, and Mr. Burnat will recall that when we walked out of the courtroom I said, "Larry, I'm sorry, I don't know what came over me." And I do apologize again to the Court and to Mr. Burnat.

In my defense, Your Honor, I would state the following, although I am an attorney at law and I hold myself in great esteem, numerous colleagues and numerous friends who are members of the Bench I considered asking to call Your Honor in my behalf, and I thought it would not be proper to do so under those circumstances. If I am ultimately found to have done something that grossly improper, and an individual is responsible for his own actions, and if I have done that, I am totally wrong and I am wholeheartedly sorry, Your Honor. Never in my wildest imagination have I ever intended to be disrespectful to this Court or even to Mr. Burnat.

The circumstances, as the Court recalls, was I was named as a party defendant in a dog-bite case. Dog-bite cases, unfortunately, are always pent up with emotion in the first place.

If the Court noticed, and as Mr. Klosik, my attorney at that time from State Farm, mentioned to the jury, and as one of the jury members downstairs when we were talking to them affirmed, Mrs. Harbold was making faces at me. I am more professional than that, Your Honor, it shouldn't have bothered me, but the entire contact, the context of the entire thing, coupled with one other thing which the Court, of course, would not be knowledgeable of or aware of, and which is partially my fault and primarily my fault. A number of years ago, Your Honor, I was diagnosed as having hypoglycemia which is low blood-sugar, and for it I am prescribed a medication called DBI T.D. or else I take Cytomil for a thyroid disfunction. That's the reason I have gained a number of pounds, many pounds, about 80 pounds over the past few years.

I have recently, or had recently gone on a starvation diet. I have taken off about 20 or 25 pounds, but hypoglycemia, and the reason I found it a number of years ago, is it gave me flashes of emotion and getting me upset and saying something, and two seconds later not knowing why. I have not taken the medication for the past year and a half, Your Honor, because as long as I am eating a proper diet the low blood-sugar doesn't effect me in anyway whatsoever. I was not eating the proper diet. In fact, I was close to starvation to knock off the weight I did. It's the only reason I could see why I lost my temper that time and said something very discourteous to Mr. Burnat, which I have never done before in my life. Never, under any circumstances, would I deem to insult the Court, which I didn't mean to do, or Mr. Burnat.

With regard to a legal argument, Your Honor, with all due respect, and I know it is a funny position to represent myself, I sent my associate to handle the case I had

this morning at 10—*Title 24, Section 105* sets forth the powers of the court to hold me in contempt and the reasons therefor. I respectfully believe, Your Honor, and I looked at it for the first time last night. I think, although what I stated to Mr. Burnat was insulting to Mr. Burnat, and I wholeheartedly apologize again to him now and to the Court, I do not respectfully believe, however, that under the laws of the State of Georgia it is something from which an individual can be held in contempt by the way *24-105* is written. There are some cases that say that the courts of the State of Georgia do not have the old common law power to hold in contempt, but they are strictly restricted to the statutory provisions. In that area, Your Honor, as a legal defense I will state that I do not believe I am technically in contempt; notwithstanding that, however, I was grossly wrong in insulting Mr. Burnat. It was not intentional and I wholeheartedly ask the Court to take that in consideration.

If the Court wishes, contact almost any judge on the Fulton County Superior Court bench where I do my primary practice. I am a criminal attorney. I have had several heated cases. I never once have ever said anything disrespectful to anyone. I handle my cases in the most professional way. As a party defendant, Your Honor, emotions run wild and it is the only excuse for saying what I said to Mr. Burnat. It was wrong, and again I respectfully apologize. That is all I can say, Your Honor.

THE COURT: Mr. Burnat, any statements you wish to make for the record, sir?

MR. BURNAT: Your Honor, all I can say is I believe Mr. Friedman's actions spoke for themselves at the time, and I don't think there is anything I can add one way or the other.

THE COURT: Thank you, gentlemen, for both of your views in the matter. The Court has given this matter considerable thought, and as far as the legal situation, Mr. Friedman, is concerned I think we have absolute right to inflict summary punishment for contempt of court as demonstrated by your action in this matter. I consider the matter much more grave due to the fact that you are a practicing attorney and should know that the Court at all times demands respect. We respect you and expect you to respect others that come before the Court and as they are required to give their utmost respect, also, to all parties.

Based on the record, gentlemen, and giving consideration to your statement, the Court is sympathetic to your situation, but I cannot overlook it. The Court finds you, Mr. Hirsch Friedman, guilty of contempt of court. I sentence you to a term of 20 days in DeKalb County jail and payment of fine of $200. Upon payment of fine of $200, 18 days of the sentence of 20 days will be served on probation by the defendant. It is so ordered.

In the event that you file an appeal and wish to file an appeal from the Court's Order, you have that right. The Court will not enforce the sentence for a period of five days. That is the sentence of the Court.

MR. FRIEDMAN: Thank you, Your Honor.

* * * * *

STATE OF GEORGIA:
COUNTY OF DEKALB:

CERTIFICATE

The foregoing transcript of the proceedings was taken before me as official court reporter for the Superior Court of DeKalb County, and reduced to typewriting, and I certify that it is a true and correct transcript of the proceedings.

This 12th day of September, 1978.

/s/ PATSY ILLICK

PATSY ILLICK
Official Certified Court Reporter
for the Stone Mountain Judicial Circuit
Certificate No. B-354

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

(A) FIRST AMENDMENT:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(B) FOURTEENTH AMENDMENT:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX F
STATUTORY PROVISIONS INVOLVED

"2-101 (Art. I, Sec. I) Par. I. Life, liberty, and property. No person shall be deprived of life, liberty, or property, except by due process of law."

"2-104 (Art. I, Sec. I) Par. IV. Liberty of speech or of the press guaranteed. No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being responsible for the abuse of that liberty."

"2-203 (Art. I, Sec. II) Par. III. Protection the duty of government. Protection to person and property is the paramount duty of government, and shall be impartial and complete."

"24-105, (4643) Powers of courts to punish for contempt. The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehaviour of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of said courts in their official transactions, and the disobedience or resistance by any officer of said court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts" . . . "

"81A-152 (CPA Sec. 52) Finds by the Court (a) Effect In all actions in superior court tried upon the facts without a jury, except actions involving only uncontested divorce, alimony and custody of minors, the court shall find the facts specially and state separately

its conclusions of law thereon and judgment shall be entered pursuant to Sec. 81A-158; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are necessary on decisions of motions under Sec. 81A-112 or 81A-156 or any other motion except as provided in sec. 81A-141(b). The requirements of this subsection may be waived in writing by the parties: Provided, all verdicts and judgments heretofore rendered in any uncontested divorce, alimony or custody case without findings of fact and conclusions of law are hereby declared to be legal and binding and of the same effect as if such cases had been rendered with findings of fact and conclusions of law. (b) Amendment Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial, but if so made, both motions shall be made within 10 days after the entry of judgment. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment. (Acts 1969, pp. 645, 656; 1970, pp. 170, 171.)"

Supreme Court, U. S.
FILED
MAR 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-902

HIRSCH FRIEDMAN,

Petitioner,

vs.

MARY ELLEN HARBOLD,

Respondent.

RESPONSE OF THE HONORABLE WILLIAM T. DEAN TO PETITIONER'S WRIT OF CERTIORARI

JAMES H. WEEKS, Attorney
Suite 453
One West Court Square
Decatur, Georgia 30030
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William T. Dean

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IN THE

Supreme Court of the United States

HIRSCH FRIEDMAN,	)	
Petitioner,	)	CIVIL ACTION
vs.	)	
	)	FILE NO. 79-902
MARY ELLEN HARBOLD,	)	
Respondent.	)	

STATEMENT OF THE CASE

The within response in opposition to Petitioner Friedman's Petition for Writ of Certiorari is respectfully submitted on behalf of The Honorable William T. Dean, Chief Judge of the Superior Courts, Stone Mountain Judicial Circuit, Georgia, the Trial Judge issuing the contempt judgment against Petitioner forming the basis of the instant appeal.

Respondent Dean was not made a party to the appeal of his order to the Georgia Court of Appeals and has thus received no notice as to the status of the appellate proceedings since the date of the entry of the Trial Court's contempt judgment on June 16, 1978. Apparently, Petitioner Friedman has only served notice on counsel for the Trial Court Plaintiff, Attorney Lawrence S. Burnat. As stated in Petitioner's statement of the case, the original law suit was one involving a damage claim arising out of a dog bite, the trial Plaintiff thus had no real interest in the outcome of the contempt appeal. It was not until February 8, 1980, when Mr. Burnat notified the DeKalb County District Attorney's office of the request for a response

received from Michael Rodak, Jr., Clerk of the United States Supreme Court, by letter dated January 28, 1980, that Judge Dean became aware of the Petition for Writ of Certiorari that has been filed in this Court.

ARGUMENT

I.

PETITIONER IS NOT ENTITLED TO A HEARING ON CONTEMPT BEFORE A JUDGE OTHER THAN THE JUDGE ISSUING THE CONTEMPT CITATION WHERE NO SHOWING HAS BEEN MADE OF PERSONAL BIAS AGAINST THE PETITIONER OR THAT THE JUDGE WAS "PERSONALLY EMBROILED" WITH PETITIONER.

As set out in the Trial Court's order dated June 16, 1978, the Court based its contempt judgment against Petitioner upon Petitioner's statements and actions directed toward opposing Counsel and other witnesses during the trial. There is nothing contained in the record and no facts exist which in any way suggest that Petitioner's contempt conviction was based upon conduct involving Judge Dean personally.

Petitioner has erroneously interpreted this Court's ruling in *Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S. Ct. 499 (1971) and *Offutt v. United States,* 348 U.S. 11, 75 S. Ct. 11 (1954). Both of these cases involved personal attacks by the contemptor upon the trial judge and are readily distinguished from the facts in the present case. *Mayberry* and *Offutt* only set our the standard that, where a judge has become "personally embroiled" with counsel in a trial, then due process dictates that the judge disqualify himself from presiding at the post-trial contempt hearing. *Mayberry v. Pennsylvania,* Supra, 400 U.S. at 465, 466.

Petitioner in the present action has not even contended that the trial Judge was personally involved in the contemptuous conduct and, as such, should have disqualified himself. Rather,

Petitioner attempts to argue an across-the-board theory of disqualification which would prohibit any trial judge from sitting at the hearing on the contempt committed in his courtroom. Such an argument is contrary to the decisions of this Court as well as numerous circuit courts and would appear to impugn the impartiality of all trial judges as well as their ability to deal fairly with contemptuous conduct committed in their presence.

The principal of law as stated in the case of *Unger v. Sarafite,* 376 U.S. 575, 84 S. Ct. 841 (1964), is controlling based upon the facts in the present case. In *Unger,* this Court reviewed the record of the trial court below and determined that there was nothing contained therein which would indicate that the trail judge had "permitted himself to become personally involved with Petitioner." *Unger v. Sarafite,* Supra, 376 U.S. at 585. As stated by this Court:

> "We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions." 376 U.S. at 584.

There is no evidence in this case of any personal bias of Judge Dean against the Petitioner or of any involvement of the Judge in the controversy itself. Petitioner was cited for contempt based upon his "disrespectful conduct" to the opposing attorney and other witnesses in the case. Petitioner was afforded a separate contempt hearing which fully comported with all requirements of due process, including the right to notice, counsel and to present and cross examine witnesses. There is nothing to the contrary expressed in the decision of the Georgia Court of Appeals cited by Petitioner, *Farmer v. Holton,* 146 Ga. App. 102, 245 S.E. 2nd 457 (1978). *Farmer,* as did *Mayberry* and *Offutt,* involved contumacious conduct directed toward the judge personally.

The Georgia Court of Appeals correctly stated the rule of law applicable to this case when it held that there was no merit in

Petitioner's claim that his trial for contempt violated the due process clause of the 14th amendment. As held by this Court and the 3rd, 4th and 7th Circuit Courts of Appeals, where an examination of the record does not indicate that the trial judge became "personally embroiled" in a battle with the petitioner, the removal of the contempt proceedings to a different judge is unnecessary. *Unger v. Sarafite,* Supra; *United States v. Prewitt,* 553 F. 2d 1082, 1088 (7th Cir.1977); *United States v. Marx,* 553 F. 2d 874, 877 (4th Cir.1977); *Com. of Pa. v. L. U., 542, Intern, U. of Op. Engrs.,* 552 F. 2d 498, 514 (3rd Cir.1977); *Paul v. Pleasants,* 551 F. 2d 575, 579 (4th Cir.1977).

Further, and is noted by the Georgia Court of Appeals in its decision, this constitutional question was not raised by Petitioner in the trial court so as to afford the trial judge an opportunity to pass on it, but was first raised on appeal. Where, as here, the "question of the constitutionality of the proceeding or as to the denial of due process of law with regard to the contemptor" was not raised before the trial judge, "such question cannot now be raised for the first time" on appeal. *Garland v. State of Georgia,* 101 Ga. App. 395, 400 (1960).

II.

PLAINTIFF WAS PROPERLY HELD IN CONTEMPT FOR HIS MISBEHAVIOR IN THE PRESENCE OF THE COURT UNDER THE PROVISIONS OF GA. CODE ANN §24-105.

Ga. Code Ann §24-105 provides in part:

> "The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of *any person or persons in the presence of said courts* or so near thereto as to obstruct the administration of justice ..." (emphasis added).

As stated in Judge Dean's order of June 15, 1978, Petitioner was held in contempt for his "impertinent, disrespectful, rude

and insulting behavior" while testifying as a witness and defendant. (Appendix A, attached hereto). There is nothing contained in the record or the order of the Court to support Petitioner's contention that the Court held him in contempt based upon his misbehavior as an officer of the court in his official transactions.

While, on the one hand pointing out to this Court that Petitioner "by profession is a practicing attorney and a member in good standing of the State Bar of Georgia" (Petitioner's Writ of Certiorari, Page 5), Petitioner would, on the other hand, argue that he sheds any additional responsibilities or duties resulting from his position as an attorney in respect to deference to the Court and its judicial officers while he is testifying as a witness. There is nothing in the record to suggest that the trial court singled out Petitioner for contempt solely because of his status as an attorney at law. The Court only noted, in weighing the facts and circumstances surrounding the judgment of contempt, that Petitioner, as an attorney, had knowledge that other individuals may not have had and, thus, the actions on his part were of more concern to the Court.

The Court of Appeals correctly determined that Petitioner here, as an attorney and officer of the court, does not shed his duties when he becomes a witness in his own behalf. *Friedman v. Harbold,* 150 Ga. App. 482 (1979); *Cohran v. Sosebee,* 120 Ga. App. 115 (1969). The Georgia Code and Canons of Ethics for lawyers demand a high degree of responsibility from attorneys when dealing with the court and its officers, and such statutes are applicable to govern the actions of attorneys in whatever capacity they may function. Ga. Code Ann §9-601(1); Ga. Code Ann Tit. 9 appen. EC 1-5.

Petitioner's argument that he should not be held to the legal and ethical standards of conduct prescribed for attorneys in the State of Georgia, when functioning as a witness in a court of law, is a disservice to himself as well as to the entire legal profession.

III.

PETITIONER HAS NO CONSTITUTIONALLY PROTECTED RIGHT TO ENGAGE IN DISRESPECTFUL AND INSULTING BEHAVIOR IN A COURT OF LAW AND THE TRIAL COURT CORRECTLY HELD SUCH CONDUCT TO BE CONTEMPTUOUS.

Petitioner argues that he has a constitutional right to call opposing counsel and witnesses liars in open court, and further states that "(n)o one disputes the fact that the trial was an orderly one and that Petitioner was charged with contempt for an isolated statement ..." (Petitioner's Writ of Certiorari, Page 10-11). Both of these statements are in error. The Georgia appellate courts have correctly laid down the rule that:

> " 'The question, whether there is a contempt of court, and the question whether, if there is one, it ought to be punished or ought to be excused, and other questions, as to contempt, are questions for the discretion and judgment of the court ... Whatever decision then, it comes to, on such questions, ought to be final, at least, unless there is something in the decision to show a most flagrant abuse of the discretion.' ***Beebe v. Smith,*** 76 Ga. App. 391, 410 (1948)." ***Cabot v. Yarborough,*** 27 Ga. 476, 478.
>
> "On the hearing of contempt proceedings, the trial judge is the trior of the issue and is vested with broad discretion where the evidence on the issue of the contempt is conflicting." ***Yancy v. Mills,*** 210 Ga. 684, 685, 82 S.E. 2d 505 (1954); accord, ***Farmer v. Holton,*** Supra, 146 Ga. App. at 106.

The reason for this wide discretion which is vested in the trial judge is that the judge alone has the opportunity to observe the speech, manner, tone and general demeanor used by counsel forming the basis of the contempt. Such is the fact in the instant case. While Petitioner would contend that the trial was an orderly one and his only contemptuous behaviour consisted of the subject statement to opposing counsel, such conclusion is

not supported by the record and, in fact, is erroneous. If a transcript of the entire proceedings were available for review, it would be apparent that Petitioner's behavior and manner throughout the trial were rude and disrespectful to the parties in the action.

It is this opportunity by the trial court to observe the total behavior, tone and actions of an attorney, that is not available to an appellate court on review. Thus, absent "an enormous abuse of discretion, the trial court's decision should not be disturbed." ***Cabot v. Yarborough,*** 27 Ga. 476 (1859). As stated by the Georgia Court of Appeals in ***Garland v. State of Georgia,*** Supra, 101 Ga. App. at 416:

> "If any doubt exists that the tone of voice or manner of speech used by counsel may be taken into consideration by the court in adjudging him in contempt, this court would hasten to lay such doubt at rest. As was said by Judge MacIntyre in his special concurrance on motion for rehearing in the case of ***White v. State of Georgia,*** 71 Ga. App. 512, 516 (31 S.E. 2d 78) in quoting from 1 Bailey on Habeas Corpus, p. 213, 'Contempt may consist in manner and tone as well as by affirmative act of speech. A court may be insulted by the most innocent words uttered in a peculiar manner or tone. Words used may or may not be contemptuous according to the manner in which they were spoken. The court to which the language is addressed is necessarily, in such a case, the judge in this respect, and its conclusion once formed is conclusive upon every other court.' "

The cases cited by Petitioner in support of his claim that a violation of his constitutional right of speech was violated all involved out of court statements made by non-parties to the litigation or news articles and are certainly not applicable to the instant factual circumstances. ***Wood v. Georgia,*** 370 U.S. 375, 82 S. Ct. 1364 (1962); ***Bridges v. State of California,*** 314 U.S. 252, 62 S. Ct. 252 (1941); ***Pennekamp v. State of Florida,*** 328 U.S. 331, 66 S. Ct. 1029 (1946); ***Craig v. Harney,*** 331 U.S. 367,

67 S. Ct. 1249 (1947).

IV.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ISSUED BY THE TRIAL COURT CONFORMED TO THE REQUIREMENTS OF GA. CODE ANN §81A-152 AND CONSTITUTE NO VIOLATION OF PETITIONER'S RIGHT OF DUE PROCESS.

The Georgia Court of Appeals correctly held this last argument maintained by Petitioner to be without merit. Ga. Code Ann §81A-152 requires that, with the exception of actions involving uncontested divorce, alimony and custody of minors, in all actions in superior courts tried upon the facts without a jury, the court shall enter its findings of fact and conclusions of law upon which the judgment is based. Code §81A-152 does not set out any specific form or requirements for such findings of fact and conclusions of law. Rather, such findings are sufficient where they inform the appellant of the grounds upon which the judgment was based so as to enable him to complain of and appeal from the judgment rendered and to enable the appellate court to understand the basis of the decision and conclusion of law reached. *Brown v. Brown,* 237 Ga. 201, 227 S.E. 2d 360 (1976); *Doyal Development Co., Inc., v. Blair,* 133 Ga. App. 613, 211 S.E. 2d 642 (1974).

The trial court's June 16, 1978 order clearly sets out findings of fact summarizing the events leading up to the contempt citation, including the incorporation of the entire proceedings before the Court at the contempt hearing (Appendix A, attached hereto). Further, in the Court's conclusions of law adjudging Petitioner in contempt, the Court, noting that it had given consideration to the defense offered by the Petitioner, reduced the 20 day jail sentence to allow 18 of the days to be served on probation upon payment of the $200 fine.

Petitioner's argument that the trial court's judgment is legally insufficient to inform him of the nature of the judgment

entered against him is patently fallacious and totally without merit.

CONCLUSION

Based upon the foregoing argument and citation of authorities, Respondent William T. Dean respectfully urges this Court to deny Petitioner's application for Writ of Certiorari and to uphold the decision of the Georgia Court of Appeals in the instant action.

Respectfully submitted,

JAMES H. WEEKS
Assistant County Attorney
DeKalb County, Georgia

Suite 453
One West Court Square
Decatur, Georgia 30030
(404) 373-4553

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing "Response of The Honorable William T. Dean To Petitioner's Writ of Certiorari" upon:

Spencer J. Krupp, Esq.
3179 Maple Drive N.E.
Atlanta, Georgia 30305

by depositing a copy of same in the United Stated Mail in a properly addressed envelope with adequate postage affixed thereon.

This 27 day of Feb., 1980.

ROBERT H. WALLING
DeKalb County Attorney

By:_____
JAMES H. WEEKS
Assistant County Attorney
DeKalb County, Georgia

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APPENDIX A

MARY ELLEN HARBOLD, NO. 77-716
PLAINTIFF

VS.

HIRSCH FRIEDMAN and DEKALB SUPERIOR COURT
DEBORAH L. BLACKMAN,
DEFENDANTS

FINDINGS OF FACT

The above-styled case being a suit for damages allegedly caused by a dog bite sustained by the plaintiff on the 15th day of November, 1976, was tried before the Court and a jury on June 7th and 8th, 1978.

The defendant, DEBORAH L. BLACKMAN, filed no defense in the case. The case being in default, the Court permitted the defendant BLACKMAN to contest the question of damages claimed by the plaintiff. The defendant BLACKMAN also testified on cross examination that she lived with the defendant, HIRSCH FRIEDMAN at the time of the incident which was the basis of the suit; that she owned the dog that was alleged to have bitten the plaintiff; that the defendant FRIEDMAN permitted the dog to live in and about the premises with the two named defendants; and that said dog was kept and maintained in the home of HIRSCH FRIEDMAN with his full knowledge and consent at all times.

The defendant HIRSCH FRIEDMAN is, by profession, a licensed practicing lawyer in the City of Atlanta, Georgia; that

near the conclusion of the case and while the defendant HIRSCH FRIEDMAN was on the witness stand being cross examined by Attorney Lawrence S. Burnat, the plaintiff's attorney, the following colloquy between said plaintiff's counsel and the defendant FRIEDMAN occurred:

> "MR. BURNAT: Okay. And, it's still your testimony that you are the only person here today that has spoken the complete truth, that you have heard?
>
> MR. FRIEDMAN: Sir, everyone of your witnesses have lied through their teeth.
>
> MR. BURNAT: That includes Mrs. Webb?
>
> MR. FRIEDMAN: That includes you, sir."

At this point, the Court admonished the witness to respect the Court and counsel and to refrain from such rude, uncivil and disrespectful conduct. The Court further advised the defendant FRIEDMAN that his disrespectful conduct would have the Court's attention at the conclusion of the trial.

At the conclusion of the trial, the Court advised the defendant that he was in contempt of court for the use of such impertinent, disrespectful, rude and insulting behavior. The Court further advised the defendant that any punishment to be meted out by the Court would be after said defendant had an opportunity to present himself with counsel before the Court on June 16, 1978, at which time he would be given an opportunity to present whatever defense of his conduct as he desired.

The defendant appeared before the Court, as ordered, on June 16th, 1978, at 10:00 a.m., and presented his defense, all as will appear from the record attached hereto and by reference made a part of these findings.

CONCLUSION OF LAW

JUDGMENT

In consideration of the Findings herein, and giving consideration to the defense offered by the defendant, HIRSCH FRIEDMAN, in explanation of his conduct, the Court finds that the defendant FRIEDMAN was guilty of contempt of Court, and sentences said defendant HIRSCH FRIEDMAN to a term of 20 days in the DeKalb County Jail and the payment of a fine of $200.

Upon the payment of the fine of $200, 18 days of the sentence of 20 days will be served on probation by said defendant.

AND IT IS SO ORDERED THIS THE 16 DAY OF JUNE, 1978.

Sentence stayed for 5 days.

/s/ _____

WM. T. DEAN
Chief Judge, Superior Courts
Stone Mountain Judicial Circuit

Supreme Court, U.S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-702

HIRSCH FRIEDMAN,

Petitioner,

vs.

MARY ELLEN HARBOLD,

Respondent.

REPLY BRIEF OF PETITIONER HIRSCH FRIEDMAN

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I

INTRODUCTION

The responsive brief forwarded by Judge Dean should not be considered by this honorable court as he is neither a party nor otherwise a respondent in this case and of consequence, he lacks the requisite standing to voice any arguments without consent of both parties or this court's express permission. Rule 42, Supreme Court Rules.

Secondly, assuming Judge Dean to be properly before this court, his arguments are not only in error and un-

supported by both the facts and the law but moreover, they admit Judge Dean's apparent interest or personal stake in the outcome of this case so as to buttress petitioner's view that such a personal stake required a different judge to hear the contempt citation. Petitioner herein shall address these issues and demonstrate Judge Dean's position to be unacceptable and unpersuasive.

II

ARGUMENT AND CITATION OF AUTHORITIES

(A) JUDGE WILLIAM T. DEAN LACKS STANDING TO ARGUE BEFORE THIS HONORABLE COURT.

Petitioner is somewhat perplexed as to how Judge Dean can argue in opposition to petitioner where, for all practical purposes, he is appealing his own decision. The judge was not a party to the original lawsuit and only became involved as the trial judge by happenstance pursuant to the assigning of the case to him under local court rules. No permission by both parties herein was sought or obtained and no Order from this court has permitted amicus curiae status. Rule 42, Supreme Court Rules. Oddly enough, the judge nonetheless maintains he has no personal stake in the outcome.

The requirements of legal standing as a condition precedent to arguing before this court is a well settled principle of law. The doctrine can be generally described as concerning *who* may assert certain contentions in a court of law. The standing issue has deep roots in American jurisprudence, having as its genesis the numerous and complex issues involving the language in Article III of the United States Constitution as first applied to taxpayer lawsuits, *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Doremus v. Board of Education*, 342 U.S. 429

(1952); *Baker v. Carr*, 369 U.S. 186 (1962); *Flast v. Cohen*, 392 U.S. 83 (1968), and by later decisions to other areas of law. See: *NAACP v. Alabama*, 357 U.S. 449 (1958); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Griswold v. Connecticut*, 381 U.S. 479 (1963).

In *Baker v. Carr* and *Flast v. Cohen*, both *supra*, one can readily discern the illogic in Judge Dean's position wherein he implies on the one hand he has standing, while on the other hand stating he has no personal involvement in the instant case:

> ". . . The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The "gist of the question of standing" is whether the party seeking relief has "alleged such *personal stake in the outcome of the controversy* as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justifiable." 392 U.S. at 99, 100 (Emphasis supplied).

Fundamentally, to allow Judge Dean to appeal *his own decision* would open a pandora's box of appellate problems. It would, without question, allow every judge to assume an adversary role. Sanctioning this course of conduct is manifestly unfair and inequitable and will ultimately place an insurmountable burden upon the State to

respond and will furthermore usurp well settled principles of law which confine argumentation to *parties*. Clearly, Judge Dean cannot be permitted to transgress his position of neutrality in his quest to become an adversary in this case; it will present conflicts of interest of staggering proportions.

Petitioner respectfully submits Judge Dean has no authority to be before this court in an attempt to appeal his own decision. He has not requested amicus curiae status and absent consent or special permission from this court, he cannot turn from judge to adversary.

(B) JUDGE DEAN'S ATTEMPT TO APPEAL HIS OWN DECISION IS PRIMA FACIE PROOF OF HIS PERSONAL INVOLVEMENT IN THE INSTANT CASE.

Contrary to the judge's assertions, *Baker v. Carr*, and *Flast v. Cohen*, both *supra*, show the concept of standing includes *by definition* personal involvement in the case. Even Judge Dean agrees that such personal involvement requires a different judge to hear the merits of the contempt citation (Response of the Honorable William T. Dean to Petitioner's Writ of Certiorari; pps. 2-4).

(C) PETITIONER IS ENTITLED TO A NEUTRAL JUDGE REGARDLESS OF WHETHER THE JUDGE WAS PERSONALLY EMBROILED WITH THE PETITIONER.

Petitioner's position is not so bold as Judge Dean would have this court believe. The ruling sought in this case goes only one logical step further than *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), where, as here, the purported contemptuous language was addressed not to the judge, but nonetheless occurs in the courtroom and

especially where it is the judge himself who has issued the contempt citation as being personally offensive to him.

The non-summary hearing held in this case was merely form without substance where the issuance of the citation itself manifested the judge's predisposition to rule on the contempt adversely to petitioner. Judge Dean would have this court believe the reasons prompting his issuance of a citation are placed aside and that he could nonetheless remain neutral when it was that very judge who felt strongly enough to issue the citation in the first instance.

Once a judge issues a citation, there should be nothing more for that judge to decide. As far as the issuing judge is concerned, he has already expressed how he feels. By holding a hearing, he only gets a chance to formally re-affirm his first ruling. That is precisely why it is so crucial to have another judge rule on the contempt action. Due process demands neutrality and impartiality and the safeguards so carefully erected to insure same are vitiated when one judge acts as both accuser and trier of fact at a non-summary hearing.

(D) PETITIONER WAS UNLAWFULLY HELD TO A HIGHER DEGREE OF CULPABILITY THAN ANY OTHER WITNESS UNDER THE SAME OR SIMILAR CIRCUMSTANCES.

As *Townsend v. State*, 54 Ga. App. 627, 188 S.E. 560 (1936) makes clear, attorneys should not be judged by different standards when alleged contemptuous conduct is in issue. However, Judge Dean did, in fact, make petitioner's status an important fact, finding the situation "much more grave" because petitioner was an

attorney. This is constitutionally impermissible as a denial of equal protection of the laws as guaranteed under the Fourteenth Amendment to the United States Constitution.

(E) PETITIONER'S CONDUCT POSED NO CLEAR AND PRESENT DANGER TO THE ORDERLY ADMINISTRATION OF JUSTICE.

Regardless of whether the alleged contemptuous statements were uttered in or out of court, the fact remains that to be actionable, same must interfere with the orderly administration of justice. *Wood v. Georgia*, 370 U.S. 375 (1962). The record in this case evidences no such disruptive conduct and as such, no clear and present danger was experienced at trial. Absent a showing of interference, there was truly no contempt of court.

III
CONCLUSION

For the reasons forwarded herein, petitioner prays for a reversal of the trial court's ruling finding him in contempt of court.

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

I, Spencer J. Krupp, hereby certify that I have served a copy of the foregoing Reply Brief on LAWRENCE S. BURNAT, at 127 Peachtree Street, N.E., Atlanta, Georgia 30303 and JAMES H. WEEKS, Assistant County Attorney, Suite 453 One West Court Square, Decatur, Georgia 30030.

This 25th day of March, 1980.

By:_____

SPENCER J. KRUPP
Attorney for Petitioner